UKPEAGVIK INUPIAT CORP.

IBLA 84-154 Decided June 6, 1984

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting Native village corporation selection application in part and approving the surface estate of certain lands for interim conveyance to the Native village corporation. F-14836-A.

Affirmed.

1. Alaska Native Claims Settlement Act: Definitions: Federal Installation -- Alaska Native Claims Settlement Act: Definitions: Public Lands: Generally

   BLM may properly include all land actually used in connection with the administration of a Federal installation during the period of time that the land was available for selection by the Native village corporation when defining land excluded from an interim conveyance to a Native village corporation under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), regardless of whether the Federal agency may thereafter contemplate relocation of the installation.

2. Alaska Native Claims Settlement Act: Easements: Public Easements

   A BLM decision reserving a public easement, which constitutes a buffer zone around a weather balloon launching facility, pursuant to sec. 17(b) of ANCSA, as amended, 43 U.S.C. § 1616(b) (1982), will be affirmed on appeal where the decision is supported by a rational basis.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

   BLM may properly approve land for interim conveyance to a Native village corporation subject to certain third-party interests, if valid, and thereby reserve the question of whether those interests constitute valid existing rights under sec. 14(g) of ANCSA, as amended, 43 U.S.C. § 1613(g) (1982).

APPEARANCES: J. Michael Robbins, Esq., Anchorage, Alaska, for appellant; John H. Wright, Esq., Office of the General Counsel, Northwest Region, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, for the National Weather Service.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Ukpeagvik Inupiat Corporation has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated September 27, 1983, rejecting its Native village corporation selection application, F-14836-A, in part, when approving the interim conveyance of the surface estate of certain lands to the corporation.

This case involves a relatively small parcel of land originally withdrawn within the townsite of Barrow, Alaska, for use as a weather station by the Weather Bureau, now the National Weather Service (NWS), National Oceanic and Atmospheric Administration, U.S. Department of Commerce. Public Land Order No. (PLO) 3846, dated October 5, 1965, withdrew, subject to valid existing rights, approximately 8 acres of land, described as all of block 32 and lots 1 through 7 of block 33 in U.S. Survey 4615, "from all forms of appropriation under the public land laws." 30 FR 12947 (Oct. 12, 1965).

On November 15, 1973, appellant filed selection application F-14836-A for 159,112 acres of public land pursuant to section 12(a)(1) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1611(a)(1) (1982), in partial satisfaction of its entitlement under that act. The affected land had been withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, pursuant to section 11(a)(1) of ANCSA, 43 U.S.C. § 1610(a)(1) (1982). That withdrawal had included all public land within the townsite of Barrow, Alaska. On December 5, 1974, appellant filed an amendment of its selection application to include the lands withdrawn for use by NWS under PLO 3846.

Prior to the amendment of selection application F-14836-A, NWS had granted two 30-year occupation and use permits with respect to a portion of the land withdrawn under PLO 3846. Effective June 1, 1974, NWS granted a permit (DOC-NWS 74 AL-0016) to the city of Barrow for a 17,500-square-foot parcel of land for construction of a firehouse, police station, and city administration building. Effective November 1, 1974, NWS granted a permit (DOC-NWS 74 AL-0017) to the U.S. Postal Service for a 18,425-square-foot parcel of land for construction of a post office building.

On August 13, 1980, NWS filed an application (F-70246) for a determination pursuant to section 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), that the lands withdrawn under PLO 3846 were not "public lands" under ANCSA and, thus, not subject to withdrawal and selection by a Native village corporation. "Public lands" are defined as "all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation." 43 U.S.C. § 1602(e) (1982).

On October 1980, the Fairbanks District Office, BLM, issued an initial classification decision approving a petition by the city of Barrow to

classify certain land originally withdrawn under PLO 3846 for lease under section 1 of the Recreation and Public Purposes Act (R&PP), as amended, 43 U.S.C. § 869 (1982). That land, which totalled 2.365 acres, was subsequently leased by BLM for a term of 25 years to the city as an outdoor recreation facility on March 27, 1981, pursuant to R&PP lease F-67620.

By notice dated March 30, 1982, BLM, in accordance with 43 CFR 2655.3, required NWS to submit certain information supporting NWS' conclusion that the lands withdrawn under PLO 3846 were not public lands between December 18, 1971 and December 18, 1974, i.e., the period of time the lands were available for selection by appellant. On June 3, 1982, NWS submitted a response to BLM's March 1982 notice, in which it summarized the functions of the Barrow weather station. These functions include upper air and basic weather observations for purposes of dissemination to particular users and the general public. NWS further stated that between December 18, 1971 and December 18, 1974, it"did not reduce the scope of operation or program which would result in a reduction of the area needed," although it did grant two permits to the city of Barrow and the U.S. Postal Service (Letter to BLM from Stuart G. Bigler, Director, NWS - Alaska Region, dated June 2, 1982, at 3). NWS stated that the balance of the site includes five residential buildings, a sewage plant, garage, recreation hall, inflation building, office, and cold storage building. With respect to the land not occupied by these structures, NWS stated:

The remaining unaltered land in the NWS site is required for purposes of unobstructed balloon releases, buffer of the facility due to irregular sleeping hours in residences, and occasional bulk storage of such items as helium cylinders.

The upper-air release requires an unobstructed area surrounding the inflation shelter. This area must be clear to prevent the balloon and the instrument train from damage by collision during launch. In addition, the tracking instruments may inadvertently lock onto any taller structures in the area and, thus, require a second launch. The balloon is inflated with natural gas and would become a hazard if it were to hit a building or power line after release, hence a wide clear area is required for release during strong winds. The strongest winds are usually from an easterly or westerly direction * * *.

Because the NWS personnel work shifts around the clock, sleeping hours in the residences vary from day to day. This sleeping pattern requires separation of the residences by buffer zones and insulation from excessive noises in and around the site.

On June 11, 1982, BLM requested comments from appellant regarding NWS' June 1982 submission. On November 15, 1982, appellant submitted its response, contending first that the determination pursuant to section 3(e) of ANCSA, supra, should allocate to NWS all the land withdrawn under PLO 3846 excluding that land permitted by NWS to the city of Barrow and the U.S. Postal Service and leased by BLM to the city. Appellant argued that these permits and the lease indicate that the land was not necessary to NWS operations. In the

alternative, appellant stated that the original survey plat, dated September 2, 1964, for the NWS site indicated that NWS operations were restricted to lot 1 of block 32 (185,996 square feet), and that the remaining lots were set aside for residential purposes. Appellant also stated that a lease agreement (ADA-04494) entered into between NWS and the State of Alaska, Department of Transportation and Public Facilities, Division of Airport Leasing, on February 10, 1982, under which NWS agreed to lease 192,048 square feet (approximately 4.4 acres) at the Barrow Airport as a weather balloon launching facility and weather instruments site, indicates that NWS needs "no more than four acres to conduct its activities in Barrow" 1/ (Letter to BLM, from J. Michael Robbins, Esq., dated Nov. 15, 1982, at 3). Appellant also stated that the lease further indicates that NWS intends to relocate its Barrow weather station at the airport and, therefore, as the airport lease is rent-free, NWS would suffer no economic loss if its section 3(e) application was rejected. Appellant finally noted that it was aware that NWS had "entered into an arrangement" with the North Slope Borough whereby the borough would supply housing for NWS personnel and NWS would relocate its Barrow weather station in order that the Borough would be able to acquire the land. Id. Appellant stated that, in view of these facts, allocating the site to NWS would violate congressional intent under ANCSA to make land, "no longer utilized by the federal government," available for village selection. Id.

In its September 1983 decision, BLM set forth its determination under section 3(e) of ANCSA, supra, concluding that the "smallest practicable tract" actually used by NWS was a 5.7-acre parcel of land, including lots 1 and 10 through 13, block 32 and lots 1 through 4, block 33, U.S. Survey 4615. BLM rejected appellant's selection application as to this land and approved the surface estate of the remaining land, totaling 2.78 acres, for interim conveyance to appellant. In addition, BLM reserved certain public easements, including an easement for an existing balloon inflation and upper-air observation facility located in lot 3, block 33, U.S. Survey 4615 (EIN 13 C4), pursuant to section 17(b) of ANCSA, as amended, 43 U.S.C. § 1616(b) (1976). The easement includes the space within a radius of 600 feet in all directions from the center of the inflation building. BLM also made the conveyance subject to a May 14, 1974 agreement between the U.S. Department of the Navy, the Arctic Slope Regional Corporation, appellant, and three other Native village corporations, and certain third-party interest holders. 2/

In its statement of reasons for appeal, at page 9, appellant contends that the "smallest practicable tract" for NWS' operations under section 3(e)

1/ The lease agreement specifically states that it is for the following authorized uses: "Construction, operation, and maintenance of a weather balloon launching facility and weather instrument site on Parcel E; and a RBC reflector and detector and wind gauge tower on Parcel F all for use in connection with the Lessee's weather forecasting operations." Parcel E consists of 140,048 square feet and parcel F consists of 52,000 square feet. The lease agreement further states that it is for a term of 1 year from Jan. 1 to Dec. 31, 1982, with automatic renewal each year for 40 years until one party gives 30-days advance notice of cancellation.

2/ These interests were the occupation and use permits granted by NWS to the city of Barrow and the U.S. Postal Service and the R&PP lease granted by BLM to the city.

of ANCSA, supra, is less than the 5.7 acres determined by BLM, "exclusive of balloon launching activities and residential housing for employees." Appellant states that the balloon launching site is extraneous to NWS' operations, apparently considering the already existing airport lease from the State. Appellant also states that the Director, NWS, had noted, in connection with a December 4, 1979 letter to the North Slope Borough, that NWS' administrative offices for Barrow require only a 2,395-square foot office building and a 180-square-foot emergency generator building. Appellant states residential housing is "irrelevant" to determining the "smallest practicable tract." Id. at 4. Appellant also contends that easement EIN 13 C4 cannot be granted to NWS because it was not requested in NWS' section 3(e) application, is factually unsupported, is unrelated to NWS' operations, and, in the alternative, the easement should be reduced to a 200-foot radius. In particular, appellant argues that the "extensive" clearance is not mandated by regulation and is not justified by NWS. Id. at 5. Appellant notes that the balloon launching facility under the airport lease needs only a 200-foot radius. Appellant finally contends that any third-party interests created after withdrawal of the land pursuant to section 11(a) of ANCSA, supra, i.e., after December 18, 1971, the date of enactment of ANCSA, are null and void because the withdrawal operated to preclude the creation of such interests, "which were not directly related to administration of the weather facility." Id. at 8.

[1] As noted above, section 11(a)(1) of ANCSA, supra, withdrew "public lands" in the townsite of Barrow from appropriation under the public land laws on December 18, 1971, and made them available for selection by appellant. Appellant subsequently selected certain land including the land encompassed by the Barrow NWS weather station. However, despite this withdrawal and selection, section 3(e) of ANCSA, supra, defines the term "public lands" to exclude certain land from the effect of the withdrawal and selection. The excluded land is the "smallest practicable tract * * * enclosing land actually used in connection with the administration of any Federal installation." 43 U.S.C. § 1602(e) (1982). In the case of the Barrow weather station, BLM determined that this excluded land was a 5.7-acre tract of land, i.e., a portion of the original site.

The applicable Departmental regulations, 43 CFR Subpart 2655, include certain criteria for a determination of the smallest practicable site pursuant to section 3(e) of ANCSA, supra. 43 CFR 2655.2 provides that BLM "shall determine: (a) Nature and time of use. (1) If the holding agency used the lands for a purpose directly and necessarily connected with the Federal agency as of December 18, 1971; and (2) If use was continuous, taking into account the type of use, throughout the appropriate selection period 3/ * * *." With respect to the size of the tract, 43 CFR 2655.2(b)(1) provides that it "shall be no larger than reasonably necessary to support the agency's use." In addition, the tract may include:

(i) Improved lands;

3/ "Appropriate selection period" is defined by the regulations as the "statutory or regulatory period within which the lands were available for Native selection under the act." 43 CFR 2655.0-5(b).

(ii) Buffer zone surrounding improved lands as is reasonably necessary for purposes such as safety measures, maintenance, security, erosion control, noise protection and drainage;

(iii) Unimproved lands used for storage;

(iv) Lands containing gravel or other materials used in direct connection with the agency's purpose and not used simply as a source of revenue or services. The extent of the areas reserved as a source of materials will be the area disturbed but not depleted as of the date of the end of the appropriate selection period * * *.

43 CFR 2655.2(b)(3).

Based on our review of the record, we conclude that BLM was correct in concluding that the "smallest practicable tract" actually used by NWS at the Barrow weather station was a 5.7-acre tract. In so doing, BLM has excluded all land used by third parties, which was clearly not used in connection with the purposes of the weather station. Appellant disputes the inclusion of residential housing, but provides no evidence that a Federal installation under section 3(e) of ANCSA, supra, may not include such housing or that, in this case, housing is not reasonable and necessary in connection with the use. We believe that a Federal agency need only prove that a logical nexus exists between use of the certain land and administration of a Federal facility, in order to establish entitlement to a section 3(e) exclusion.

Appellant also challenges the inclusion of the balloon launching facility. This opens up the question of whether the section 3(e) exclusion may properly include land where the agency involved intends to relocate the facility using that land. We must first note that there is no evidence that the balloon launching facilities at the Barrow weather station and the airport are not distinct aspects of NWS' weather information gathering program or that the airport site was not merely a contingency measure to allow for continued operation in the event that the present site became unavailable. In any case, we conclude that, under Departmental regulations, the relevant time period for determining whether land is actually used in connection with administration of a Federal installation under section 3(e) of ANCSA, supra, is the selection period. See 45 FR 70205 (Oct. 22, 1980). It is evident that this represented a compromise between determining use based only on that use actually occurring on December 18, 1971, and proposed or future use. This compromise, had the effect of limiting the Federal agency to use actually occurring within the appropriate selection period. However, it also could have the effect of excluding certain land from a Native selection where the Federal agency subsequent to the selection period discontinued or curtailed use of the facility. As it was necessary in some way to define those uses of land which would entitle a Federal agency to a section 3(e) exclusion, use of the "appropriate selection period" represents a workable alternative. Thus, NWS' activities within the selection period, regardless of any subsequent consideration given to relocation, properly served to define the "smallest practicable tract" under section 3(e) of ANCSA, supra. In the present case, the "appropriate selection period" was the period from December 18, 1971 to December 18, 1974. 43 U.S.C. § 1611(a) (1982). We, therefore, conclude that

it was not necessary to take into account the lease agreement between NWS and the State, dated February 10, 1982.

With respect to the purported arrangement with the North Slope Borough regarding the entire relocation of NWS' installation, appellant has provided no evidence that this arrangement affected actual use of the Barrow weather station during the critical time period. Indeed, appellant has submitted a December 4, 1979 letter from the Director, NWS - Alaska Region, to the North Slope Borough regarding the proposed relocation, in which he states: "My position on the relocation remains unchanged, that is, the present site is fully satisfactory for our needs, therefore none of the costs should be paid by the Federal government." This letter indicates at best that any relocation, while possible, was not immediate even as of December 1979. However, even had the relocation been planned or executed, NWS would have been entitled to have the 5.7-acre tract excluded from the withdrawal based on the fact that it had used the Barrow weather station during the relevant time period. We note that any interest in relocation was not "revived" until 1982 (Letter from Director, NWS - Alaska Region, to Director, Planning Department, North Slope Borough, dated Mar. 25, 1982).

It is also evident that a large part of the 5.7-acre tract is unoccupied. However, 43 CFR 2655.2(b)(3)(ii), clearly provides for buffer zones in the interest, as in the present case, of "safety measures" and "noise protection." Appellant has offered no evidence to dispute NWS' statements that the unimproved portions of its tract of land are a necessary component of the overall installation. 4/ See also Letter to BLM, from Director, NWS - Alaska Region, dated February 9, 1976.

[2] Appellant also contends that NWS is not entitled to a public easement for the balloon launching facility. Such easements were provided for by section 17(b) of ANCSA, supra. That statutory provision provides that the Secretary, prior to granting a patent to a Native village corporation, "shall reserve such public easements as he determines are necessary." 43 U.S.C. § 1616(b)(3) (1982). Public easements are defined by section 17(b)(1) of ANCSA, supra, as those easements "which are reasonably necessary to guarantee * * * a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important." (Emphasis added.) The reference to the "Planning Commission" is to the Joint Federal-State Land Use Planning Commission for Alaska which identified public easements arising under ANCSA. We conclude that the applicable Departmental regulations contemplate the public easement involved: That the area within a 300-foot radius of the center of the inflation building and the area between a radius of 300 and 600 feet and above 30 feet be kept clear of any obstructions. In particular, 43 CFR 2650.4-7(c)(2), provides, under miscellaneous easements, for "[e]asements for air light or visibility purposes * * * if required * * * to permit proper use of improvements developed for public benefit or use, e.g., protection for

4/ In its November 1982 submission, appellant also argued that the size of the tract to be allocated to NWS was somehow restricted by a 1964 survey of the NWS site. We disagree. The statute makes clear that the relevant standard for determining the "smallest practicable tract" is actual use.

aviation or navigation aids or communications sites." Moreover, 43 CFR 2655.2(c) states that, in the case of Federal installations, a public easement may be reserved pursuant to section 17(b) of ANCSA, supra, in lieu of exclusion from the category of public land pursuant to section 3(e) of ANCSA, supra:

> Generally, full fee title to the tract shall be retained; however, where the tract is used primarily for access, electronic, light or visibility clear zones or right-of-way, an easement may be reserved in lieu of full fee title where the State Director determines that an easement affords sufficient protection, that an easement is customary for the particular use and that it would further the objectives of the act.

It was not necessary for NWS to request that the reservation of public easement EIN 13 C4 in its section 3(e) application be considered. BLM as the delegate of the Secretary had authority under section 17(b) of ANCSA, supra, to determine public easements on its own initiative. See 43 CFR 2650.4-7(a)(8) through (12). The real questions posed by appellant are whether NWS is entitled to an easement for a balloon launching facility and if it is so entitled, what is an appropriate size. We conclude that the BLM decision to grant the easement is fully supported. The June 1982 letter from NWS to BLM, quoted, supra, states the justification for a "wide clear area" around the balloon launching site, i.e., in order to avoid collisions with any obstructions. In addition, the record contains a report of a telephone conversation, dated March 10, 1983, between a BLM employee and an NWS employee, which states that because of predominant east-west winds, the "present area (open) * * * should be the minimum." Thus, the record indicates that the 600-foot radius of easement EIN 13 C4 merely maintains the past buffer zone around the balloon launching facility. Moreover, the record supports NWS' use of the facility in connection with its weather gathering function during the selection period. Appellant has provided no evidence to contradict NWS' need for a 600-foot radius at the Barrow weather station. Even assuming that the NWS facility at the airport for launching balloons only requires a 200-foot radius easement, appellant has not established that the airport site is used in the same fashion as the facility at the Barrow weather station or that the conditions under which it is operated are the same. 5/

[3] Finally, appellant challenges the reservation of third-party interests to the extent that they were created by NWS and BLM after the withdrawal pursuant to section 11(a) of ANCSA, supra. These interests were to be reserved in the interim conveyance pursuant to section 14(g) of ANCSA, as amended, 43 U.S.C. § 1613(g) (1982), which provides in relevant part that:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or

5/ It can also be assumed that there is much less likelihood that a structure of a height to interfere with balloon launches would be built at an airport.

> minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement.

These third-party interests were not found to constitute exclusions from the category of public land and, thus, are not protected under section 3(e) of ANCSA, supra. Rather, the conveyance to a Native corporation is made subject to these interests. The question raised is whether these interests should be considered valid existing rights under the statute. In the present case, these interests, created in favor of the city of Barrow and the U.S. Postal Service, clearly constitute leases or permits and, thus, fall within the category of interests which may be considered valid existing rights. See 43 CFR 2650.3-1(a) and 2650.4-1; Ketchikan Public Utilities, 79 IBLA 286 (1984). Appellant, however, contends that these interests cannot be valid existing rights because they were created after withdrawal of the land on December 18, 1971. Section 14(g) of ANCSA, supra, specifically provides that a patent issued under ANCSA shall be subject to a lease or permit where the latter has been issued "prior to patent."

We need not address the question of the validity of the specific lease and permits involved herein as it was expressly stated that the interim conveyance would include these lands, subject to these third-party interests, "if valid." BLM thus reserved the question as to the validity of these interests, and the Board declines to express an opinion on this subject. We note, however, that BLM properly identified these third-party interests placing appellant on notice as to these possibly valid section 14(g) interests. See Secretarial Order No. 3016, 85 I.D. 1 (1977).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Will A. Irwin
Administrative Judge